

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

SUSAN L. DORSEY,
Petitioner/Employee,

v.

THE INDUSTRIAL COMMISSION OF ARIZONA,
Respondent,

LA POSADA AT PARK CENTRE, INC.,
Respondent/Employer,

LIBERTY MUTUAL FIRE INSURANCE COMPANY,
Respondent Insurer.

No. 2 CA-IC 2013-0018
Filed July 28, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c); Ariz. R. Civ. App. P. 28(c).

SPECIAL ACTION - INDUSTRIAL COMMISSION
ICA Claim No. 20111610095
Insurer No. WC197A13083
The Honorable LuAnn Haley,
Administrative Law Judge

AFFIRMED

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COUNSEL

Tretschok, McNamara & Miller, P.C., Tucson
By J. Patrick Butler
Counsel for Petitioner/Employee

The Industrial Commission of Arizona, Phoenix
By Andrew F. Wade
Counsel for Respondent

Cross & Lieberman, P.A., Phoenix
By Donald L. Cross
Counsel for Respondents Employer and Insurer

MEMORANDUM DECISION

Presiding Judge Miller authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Brammer¹ concurred.

M I L L E R, Presiding Judge:

¶1 In this statutory petition for special action, petitioner Susan L. Dorsey challenges the administrative law judge's (ALJ) findings and decision upon review that she was stable and stationary with no permanent injury. Dorsey contends the ALJ erred by accepting the opinion of the independent medical examiner and failing to consider when Liberty Mutual Fire Insurance Company (Liberty) made payment for court-ordered medical treatment. She also argues the ALJ's earlier finding of a compensable injury precluded Liberty from proving that Dorsey no longer required active care. Because the ALJ did not err, we affirm.

¹The Hon. J. William Brammer, Jr., a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and the supreme court.

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Factual and Procedural Background

¶2 We view the evidence in the light most favorable to affirming the Industrial Commission's findings and award. *Polanco v. Indus. Comm'n*, 214 Ariz. 489, ¶ 2, 154 P.3d 391, 392-93 (App. 2007). In June 2011, Dorsey was working as a health aide at La Posada Park Centre, an elderly resident care facility, when she injured her wrist while assisting a patient. Dorsey filed a worker's compensation claim that was initially accepted, but in August 2011, Liberty rescinded approval because its independent medical examiner determined Dorsey's complaints were not causally related to the industrial injury. Dorsey requested a hearing on the issue of whether the injury was compensable.

¶3 At the hearing, Dorsey's expert testified that she suffered from Complex Regional Pain Syndrome (CRPS). The ALJ found the opinion of Dorsey's expert to be the most probably correct and well-founded and concluded the injury was compensable. Neither party sought review and the award became final. *See* A.R.S. § 23-942(D) (award final if no request for review within thirty days).

¶4 In November 2012, Dorsey filed a request for hearing pursuant to A.R.S. § 23-1061(J), claiming that Liberty had refused to pay her out-of-pocket medical and mileage expenses, refused to reimburse her insurance carrier for medical expenses already incurred, refused to pay for an evaluation by a physical therapist, and refused to authorize stellate ganglion block pain treatments. Several months later, Liberty closed Dorsey's claim, concluding she had no permanent disability. Dorsey filed another request for hearing, which the ALJ consolidated with the earlier hearing request. After three evidentiary hearings, the ALJ issued a decision finding Dorsey stable and stationary but entitled to supportive care consisting of four office visits with a pain management physician and prescription pain medication. The ALJ also ordered Liberty to reimburse Dorsey and her medical providers for all treatment provided since the date of the award, August 15, 2013.² Dorsey filed

²The claims for past mileage expenses and reimbursements were resolved before the ALJ issued her decision.

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a request for review, and the ALJ affirmed her award. This petition for special action followed.

Testimony of Independent Medical Examiner

¶5 Dorsey argues first that the testimony of Liberty’s independent medical examiner (IME), Dr. Stephen Borowsky, was speculative and lacked foundation; therefore, the ALJ erred by relying on that testimony in support of its award and closure of the claim. Specifically, Dorsey contends Borowsky’s conclusion that disuse caused her continuing pain and atrophy was “conjecture and speculation.” She also contends his opinion that neither stellate ganglion blocks nor physical therapy were medically necessary lacked foundation. She makes the same objection to his conclusion that she did not suffer from CRPS.³

¶6 To support an award, a medical opinion must be based on a proper foundation. *T.W.M. Custom Framing v. Indus. Comm’n*, 198 Ariz. 41, ¶ 18, 6 P.3d 745, 751 (App. 2000). That foundation requires findings of medical fact, usually based on the patient’s medical history, records, diagnostic tests, and examinations. *Id.* The ALJ may not rely on testimony based entirely on speculation and conjecture. *Brown v. Indus. Comm’n*, 20 Ariz. App. 486, 488, 513 P.2d 1369, 1371 (1973); *see also Honeywell, Inc. v. Litchett*, 146 Ariz. 328, 331,

³Dorsey also contends that Borowsky “never gave a diagnosis or medical conclusion in this case.” To the extent Dorsey argues Borowsky’s diagnosis was unclear or equivocal, the record does not support her. Borowsky stated his medical findings could not support a CRPS diagnosis, her symptoms were the result of a “disuse syndrome,” and he held his opinions to a reasonable medical probability or certainty. Dorsey also contends that disuse is not a diagnosis, but she does not provide any case law or citation to the record to support this statement; therefore, we do not consider it. *See* Ariz. R. Civ. App. P. 13(a)(6) (appellant’s brief must contain “citations to the authorities, statutes and parts of the record relied on”); *Polanco v. Indus. Comm’n*, 214 Ariz. 489, n.2, 154 P.3d 391, 393 n.2 (App. 2007) (failure to develop argument according to procedural rules results in waiver).

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705 P.2d 1379, 1382 (App. 1985). Similarly, proof that an expert has relied on an inaccurate factual background can weaken medical testimony to such an extent that it cannot constitute “substantial evidence” to support an award. *Desert Insulations, Inc. v. Indus. Comm’n*, 134 Ariz. 148, 151, 654 P.2d 296, 299 (App. 1982). Where the expert’s opinion has a proper foundation, however, we will not disturb the ALJ’s finding adopting one expert opinion over another unless it is “‘wholly unreasonable.’” See *Gamez v. Indus. Comm’n*, 213 Ariz. 314, ¶ 15, 141 P.3d 794, 796 (App. 2006), quoting *Ortega v. Indus. Comm’n*, 121 Ariz. 554, 557, 592 P.2d 388, 391 (App. 1979).

¶7 Borowsky conducted two independent medical examinations and prepared two separate reports. The first report was for the initial compensability hearing. In that report, he concluded Dorsey suffered from “[a] mild resolving CRPS/RSD [reflex sympathetic dystrophy], probably self-imposed by disuse, related to the injury of 6/03/2011, with findings of color and swelling changes, with limitations in range of motion of fingers, wrist, elbow and shoulder.” He found a triple phase bone scan to be “suggestive, but not diagnostic” of CRPS, and recommended further treatment from a hand therapist, but he advised against stellate ganglion blocks for pain relief. In her decision on compensability, the ALJ accepted the opinion of Dorsey’s treating physician, who had diagnosed Dorsey with CRPS caused by the industrial injury, as the “most probably correct and well founded,” but also noted that Borowsky had corroborated that opinion.

¶8 After Dorsey made her § 1061(J) request, Borowsky conducted another examination and drafted another report. In the second report, he concluded, “The diagnosis of CRPS/RSD even though entertained in the past does not appear to be an active diagnosis or finding at this time and . . . most of the presentation appears to be that of disuse.” He noted in the report and in his testimony that one of the symptoms he did observe, a difference in the measurements of her hands, was related to disuse and the dominance of the uninjured hand. Similarly, he stated disuse would cause the swelling he observed in her fingers. He testified that, overall, there were fewer findings supporting a diagnosis of CRPS than had existed during the first examination. Regarding treatment

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of the pain, Borowsky concluded the stellate ganglion blocks were not warranted because the recent blocks had not helped, and stellate ganglion blocks are supposed to provide long-lasting relief and progressive improvement in function. He also stated it was “hard to even recommend therapy” because her past participation in therapy had been limited by complaints of pain.

¶9 Dorsey first argues that Borowsky’s testimony was speculative because she could not voluntarily cause all of her symptoms, namely swelling, atrophy, and contractures, as well as the results of a bone scan. She cites *Hackworth v. Indus. Comm’n*, 229 Ariz. 339, ¶ 10, 275 P.3d 638, 642 (App. 2012) for support. But *Hackworth* does not support Dorsey’s contention. In that case, the experts had agreed on the petitioner’s diagnosis and the only question was whether the petitioner’s employment was the cause. *Id.* ¶¶ 4-5. The IME had testified it was possible Hackworth’s injury had been caused by his employment, but he did not find a definite correlation, essentially refusing to take a position on causation. *Id.* ¶¶ 5, 14. This court concluded, “A medical examiner’s unwillingness to assent to a conclusion about medical causation, based exclusively on the speculative possibility of unknown causes of an injury, cannot be the basis for denying an otherwise compensable claim.” *Id.* ¶ 20.

¶10 Unlike the medical examiner in *Hackworth*, Borowsky testified Dorsey’s symptoms were caused by voluntary disuse; further, she did not have enough symptoms to warrant a CRPS finding. He attributed the atrophy and swelling to disuse and right-hand dominance. He was not “unwilling[] to assent” to a CRPS diagnosis, *id.* ¶ 20; rather, he disagreed with it and offered a different diagnosis. *Hackworth* is inapposite.

¶11 Dorsey next contends Borowsky lacked factual foundation for his conclusions about CRPS and the medical necessity of stellate ganglion blocks or physical therapy. Dorsey does not cite any case law in this section of her argument. She appears to rely on broad statements of law cited earlier in her brief, which require that medical conclusions be based on examinations and medical records and hold that conclusions based on factual inaccuracies are inadequate. See *T.W.M. Custom Framing*, 198 Ariz.

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41, ¶ 18, 6 P.3d at 751; *Desert Insulations*, 134 Ariz. at 151, 654 P.2d at 299.

¶12 Dorsey attacks Borowsky's stellate ganglion blocks opinion because he did not rely on her doctor's detailed records of how they were administered and he ignored the improvements she had made after earlier blocks. But there is no indication in the record that Borowsky ignored Dorsey's initial success with the stellate ganglion blocks. Rather, he relied on Dorsey's own statements of initial relief that was not continued with additional treatments. He opined she should have continued improving if the treatments were effective.

¶13 Dorsey next argues Borowsky did not have proper foundation for his conclusion that the physical therapy she was receiving in May 2013 was not working because "he hadn't seen Ms. Dorsey since January 2013 and did not have and did not review her May 2013 physical therapy records." But Dorsey had testified in July that physical therapy was going slowly, and Borowsky testified in August that because therapy was of limited use, it was not recommended. Dorsey does not appear to contend the physical therapy records would have demonstrated Borowsky's conclusion was incorrect.

¶14 Finally, Dorsey lists several medical findings Borowsky noted during his examination—including a weak grip, sensory decrease in one portion of her hand, temperature change between her two hands, and swelling in her left hand—and then argues that he "basically ignored every finding pointing to CRPS." Borowsky did not ignore the findings; rather, he did not agree that they were indicative of CRPS. He reported that Dorsey's grip was weak, but lacked a painful response, and that the temperature difference between the arms was not statistically significant. He also reported she did not suffer from other symptoms associated with CRPS. He attributed the swelling and poor grip to a disuse syndrome.

¶15 Dorsey has not shown that Borowsky relied on any incorrect facts or that he speculated where there were no facts in the record. See *T.W.M. Custom Framing*, 198 Ariz. 41, ¶ 18, 6 P.3d at 751; *Desert Insulations*, 134 Ariz. at 151, 654 P.2d at 299. Rather, Dorsey

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appears to contest his conclusions based on the facts contained in the record, presumably as those conclusions conflict with those made by Dorsey's physician. Here, the ALJ resolved any conflicts by accepting Borowsky's opinions as being "more probably correct," and we conclude the decision was not unfounded. See *Gamez v. Indus. Comm'n*, 213 Ariz. 314, ¶ 15, 141 P.3d at 796.

Payment for Medical Treatment

¶16 Dorsey contends Liberty withheld medical care and medical payments ordered by the ALJ, preventing her from receiving care and treatment for CRPS, which precludes it from arguing the CRPS had been resolved. Dorsey also appears to contend she is owed payment for mileage used in driving to treatments. She does not indicate, however, how the ALJ erred or what relief she seeks in light of this argument. To the extent Dorsey contends the ALJ erred in concluding the CRPS was resolved on the basis of her lack of improvement, she provides no citation to the record or to authority for this argument; therefore, we do not consider it. Ariz. R. Civ. App. P. 13(a)(6) (argument "shall contain the contentions of the appellant . . . with citations to the authorities, statutes and parts of the record relied on"); *Polanco*, 214 Ariz. 489, n.2, 154 P.3d at 393 n.2 (argument waived where no relevant supporting authority cited).

¶17 Dorsey's argument that she was not provided medical care as required by A.R.S. § 23-1062(A) also is waived, because it was not raised in her request for review. *Brown v. Indus. Comm'n*, 168 Ariz. 287, 288, 812 P.2d 1105, 1106 (App. 1991). It also is apparent from the record, as Dorsey acknowledges, she was reimbursed for her out-of-pocket costs and mileage before the ALJ issued her decision. Additionally, the ALJ awarded Dorsey reimbursement for additional medical treatments through the date of the decision. The record does not support an argument that any issue of payment for past medical treatment is unresolved.

Preclusion

¶18 Dorsey argues in her opening brief that the doctrine of issue preclusion bars Liberty from asserting the CRPS had resolved.

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She relies on the June 2012 finding of a compensable claim. In her reply brief, Dorsey clarifies that she relies on claim preclusion rather than issue preclusion.

¶19 We defer to the ALJ's factual findings but review de novo whether preclusion applies. *Brown v. Indus. Comm'n*, 199 Ariz. 521, ¶ 10, 19 P.3d 1237, 1239 (App. 2001). "'Issue preclusion' occurs when the issue to be litigated was actually litigated in a prior proceeding." *Circle K Corp. v. Indus. Comm'n*, 179 Ariz. 422, 425, 880 P.2d 642, 645 (App. 1993). Claim preclusion "preclude[s] relitigation of issues that were or that could have been determined when the claim was closed." *Perry v. Indus. Comm'n*, 154 Ariz. 226, 228-29, 741 P.2d 693, 695-96 (App. 1987).

¶20 Dorsey appears to argue that Liberty was precluded from relitigating the question of CRPS causation. However, it is apparent from the ALJ's findings that issue was not relitigated. Rather, in the later decision, the ALJ concluded the CRPS was stable and stationary.

¶21 Dorsey also appears to contend claim preclusion prevents Liberty from ever denying treatment or closing the claim after compensability was determined. Dorsey does not cite any authority for this proposition, and it conflicts with the worker's compensation statutes. Under the statutes, carriers may make unilateral benefit determinations, which are subject to a claimant's right to protest and request a hearing. See A.R.S. §§ 23-1061(F) (insurance carrier shall "promptly report to the commission and to the employee by mail . . . any denial of a claim, any change in the amount of compensation and the termination thereof"), 23-947(A) (90-day deadline for hearing request).

¶22 Liberty and Dorsey followed the statutory procedures when new issues arose that could not have been litigated at the previous hearings. After the ALJ issued her first award, Dorsey underwent a stellate ganglion procedure that was unsuccessful, and the carrier denied further procedures and ultimately closed the claim after a doctor determined Dorsey's CRPS had "plateaued." Dorsey properly objected to the denial in a request for hearing pursuant to § 23-1061(J), protested the closure pursuant to

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§ 23-947(A), and the ALJ considered whether further treatment was warranted. Neither claim nor issue preclusion applies in this case.

Attorney Fees

¶23 Finally, Liberty argues we should grant attorney fees because Dorsey's appeal was frivolous. This case involved complicated diagnoses and competing medical opinions; therefore, we do not find the appeal frivolous. *Cf. Koedyker Const. Co. v. Indus. Comm'n*, 158 Ariz. 578, 580, 764 P.2d 339, 341 (App. 1988) (appeal frivolous where both parties' experts supported employee's position). Liberty's request for attorney fees and costs is denied.

Disposition

¶24 For the foregoing reasons, the award is affirmed.